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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

EVANNA POWELL,
Petitioner

versus

ANTHONY NIGRO, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Evanna Powell, Pro se
5749 5th Street, N.E.
Washington, D.C. 20011
529-2773

## QUESTIONS PRESENTED

### I

Whether any decision of the Committee on Admissions of the District of Columbia Bar, made pursuant to, D.C. Code 11-2501, a rule-making statute, which decision relates to the admission of persons to the Bar, can be a judicial decision?

And if no decision can be judicial, whether all decisions would then, by reason of the rule-making authority of section 2501, relate to rule-making and rules, and hence, cognizable in federal district court as District of Columbia Court of Appeals v. Feldman, __ U.S. __ (1982)(No. 81-1335, Decided 3-23-83) holds in part?

### II

Whether, in view of 42 U.S.C. 1983, and Patsy v. Bd. of Regents of Florida, __ U.S. __, (No. 80-1874, Decided 6-23-82), wherein this Court ruled that exhaustion of state administrative remedies in not a prerequisite to maintaining a § 1983 action in federal district court, a bar applicant is required to litigate, in a state court, Constitutional challenges relating to a claim of a present right to admission and relating to Bar rules?

PARTIES HEREIN

| | |
|---|---|
| Evanna Powell | Petitioner |
| Anthony Nigro | Respondent |
| Jeanne L. Dobres | Respondent |
| William C. Gardner | Respondent |
| James A. Hourihan | Respondent |
| Issie L. Jenkins | Respondent |
| Allan Kay | Respondent |
| Laidler B. Mackall | Respondent |
| Richard Marsh | Respondent |
| Lee A. Satterfield | Respondent |
| Charles J. Steele | Respondent |
| Jacob A. Stein | Respondent |
| George Windsor | Respondent |

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No.

EVANNA POWELL
Petitioner

versus

ANTHONY NIGRO, ET AL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Evanna Powell, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit rendered May 11, 1983.

## JUDGMENT AND OPINIONS BELOW

In the judgment rendered May 11, 1983, the United States Court of Appeals remanded the case to the federal district court for further consideration in light of the Supreme Court's decision in District of Columbia Court of Appeals v. Feldman, __ U.S.__, 51 USLW 4285 (3-23-83)(hereinafter __ U.S. __ (1982)(No. 81-1335, Decided 3-23-83). (Appendix A, A-1).

In a Memorandum Opinion rendered July 28, 1982, the United States District Court for

the District of Columbia Circuit granted the defendants' Motion to Dismiss on the grounds of lack of subject matter jurisdiction, lack of a substantial federal question and prematurity of filing in federal district court. (Appendix B, A-6 & A-9).

By a Memorandum Opinion rendered April 2, 1982, the United States District Court for the District of Columbia Circuit denied the petitioner's Motion for Class Certification on the ground that the petitioner could not adequately protect the interest of the proposed class. (Appendix D, A-11).

## JURISDICTION OF THIS COURT

The date of the judgment to be reviewed was entered by the United States Court of Appeals for the District of Columbia Circuit on May 11, 1983. (Appendix A, A-1).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and U.S. CONST. art. III, § 2, cl. 2.

## CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

U.S. CONST. amend. V (Appendix J, A-17)
28 U.S.C. 1331 (Appendix K, A-17)
42 U.S.C. 1983 (1976 and Supp. 1980)(Appendix M, A-18 & A-19)
28 U.S.C. 1343 (Appendix L, A-17 & A-18)
D.C. Code 11-2501 (1973)(Appendix N, A-19)
L.R. 3-4 (Appendix O, A-19)

## STATEMENT OF CASE

In the United States District Court for

the District of Columbia, the petitioner instituted suit for violation of 42 U.S.C. 1983 and denial of due process and equal protection in violation of the Fifth Amendment of the United States Constitution in the administration, grading and review of the District of Columbia Bar examination.

Jurisdiction in the district court is based on 28 U.S.C. 1331 (a), 28 U.S.C. 1343 and L.R. 3-4(a)2 and L.R. 3-4(a)(3)(Local Rules of the federal district court).

After availing herself, several times, of the paper review procedure of the Committee on Admissions of the District of Columbia Bar, and never being given reasons why her answers were wrong, and therefore why she was unsuccessful, when her answers were supported by case law, statutes, regulations, ordinances and/or logic, the petitioner first instituted, in the federal district court, a federal Freedom of Information suit, Powell v. Nigro, No. 79-3208 (D.D.C. 1-25-80); No. 80-1147 (Dst. Ct. App. D.C. 5-20-80); No 79-2057 (U.S. Sup. Ct. 12-1-80), to obtain the information neccessary to determine the reasons why she was unsuccessful.

The federal district court dismissed the action on the ground of failure to state a claim upon which relief could be granted, and not on the ground of lack of subject matter jurisdiction. (Appendix G, A-14 ). The Court of Appeals affirmed the district court's decision. (Appendix G, A-16). The Supreme Court denied the Petition for Writ of Certiorari. (Appendix I, A-16).

When the Freedom of Information suit did

not provide the petitioner with the information to determine why she was unsuccessful, the petitioner instituted, in federal district court, the present action on the grounds of denial of due process, denial of equal protection and violation of § 1983 in the administration, grading and review of the District of Columbia Bar examination.

The petitioner never appealed the decision of the Committee on Admissions to the District of Columbia Court of Appeals because 1.) the review procedure stated in Rule 46(b) of the Committee rules, did not provide for or permit raising the Constitutional issues the petitioner wanted, decided (Appendix p A-20); 2.) D.C. Code 11-2501, the statute pursuant to which the Committee and Court of Appeals act, in connection with the admission of persons to the District of Columbia Bar, does not, because it is a rule-making statute, confer upon either the Committee or Court, jurisdiction to entertain a case or controversy (Appendix N, A-19), and because 3.) the Court of Appeals, being an appeals court with appellate jurisdiction, lacks general or specific statutory authority to entertain the petitioner's claims de novo. (Appendix N, A-19)

The present action for denial of due process, equal protection and violation of § 1983 was dismissed by the federal district court on July 28, 1982, on the grounds of prematurity of filing in federal district court, in other words, exhaustion of state remedies; lack of a substantial federal question and lack of subject matter jurisdiction. (Appendix B, A-6 & A-9).

The petitioner appealed the decision of the federal district court to the United

States Court of Appeals for the District of Columbia Circuit. The case was remanded for further consideration in view of this Court's decision in D. C. Court of Appeals v. Feldman and Hickey, __ U.S. __ (1982)(No. 81-1335, Decided 3-23-83). (hereinafter Feldman)(Appendix A, A-1).

REASONS FOR GRANTING THE WRIT

The questions presented for review are too important to be denied review and are too crucial to the ultimate outcome of the action itself to require that appellate consideration be deferred until the whole case is adjudicated.

The Writ should issue because neither this Court nor the courts below, in deciding Feldman, addressed the issue of whether, because of the statute pursuant to which the Committee on Admissions of the District of Columbia Bar acts, D.C. Code 11-2501, is a rule-making statute, all decisions of the Committee, pursuant to said statute, are precluded from being judicial decisions. And if so precluded from being judicial decisions, then the decisions of the Committee are cognizable in federal district court, as are other decisions relating to the Committee's rules and rule-making.

The Writ should issue because this Court and the courts below have not decided the issue of whether, in view of § 1983 and of Patsy v. Bd. of Regents of Florida, __ U.S. __,(No. 80-1874, Decided 6-23-82), wherein this Court ruled that exhaustion of state administrative remedies is not a prerequisite to maintaining a § 1983 action in federal district court, a petitioner may raise

in the first instance in federal district court, Constitutional challenges relating to rules and rule-making, as well as, Constitutional challenges relating to an individual claim of a present right to admission to the Bar.

The Writ should issue in order to promote judicial efficiency, avoid irreparable harm and hasten the ultimate termination of this litigation.

I

D.C. Code 11-2591 (1973 and 1981)(hereinafter § 2501) is the statute pursuant to which the Committee acts, and it states in relevant part,

> The District of Columbia Court of Appeals shall make such rules as it deems proper regarding the examination, qualification and admission of persons to membership in its bar ****(emphasis added).

Section 2501 grants the Committee on Admissions, via the District of Columbia Court of Appeals, authority to only make rules, and by virtue of this statutory grant of authority, any decision the Committee makes relating to the examination, qualification or admission of persons to the Bar of the District of Columbia is a rule-making, and hence, a non-judicial decision.

Section 2501 confers no jurisdiction to entertain a case or controversy relating to the admission of persons to the Bar, therefore, since jurisdiction to

entertain a case or controversy is a prerequisite to rendering a judicial decision, and the Committee has no such jurisdiction, then the Committee cannot render a judicial decision.

Regarding this Court's decision in D.C. Court of Appeals v. Feldman, the petitioner is in agreement with that part of the decision holding that the federal district court has subject matter jurisdiction over Constitutional challenges relating to the rules and rule-making of the Committee.

The petitioner finds the other part of the decision, holding that the federal district court lacks subject matter jurisdiction to review the judicial decision of the highest state court inapplicable to her case because of 1.) the Committee's and highest court's, due to § 2501, being incapable of rendering a judicial decision and 2.) the petitioner's having asked the federal district court to entertain her claims de novo; not to review them.

According to Feldman, a judicial decision results from a judicial inquiry, and according to Feldman, slip op. at 15,

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under law supposed already to exist.

When trying to determine whether the Committee's decision, in the petitioner's case, was or was not judicial, within the perview of the judicial -inquiry standard, one finds that the action of the Committee,

based solely on the grading of examinations, does not comply with the standard, since by the act of grading, the Committee made no investigation, declaration or enforcement of liabilities as liabilities stood on past or present facts.

If, as stated in Feldman, slip op. at 15, the character of the proceeding, rather than the character of the body is determinative of the nature of the proceeding, that is, whether the proceeding is judicial or non-judicial, then the proceeding of grading examinations--be the grading for one to become a plumber, a doctor or a lawyer--is not a judicial function and does not result in a judicial decision.

Rather than appeal the apparently unappealable decision of the Committee on Admissions to the Supreme Court, the petitioner instituted suit in federal district court in order to get a hearing on the Constitutional claims which were not, and could not, due to the Committee's Rule 46(b) limiting review to examination questions, be raised before the Committee. (Appendix P, A-20).

The requisite authority for the federal district court to exercise original subject matter jurisdiction is found in 28 U.S.C. 1331 (1980), 28 U.S.C. 1331(a)(1976)(hereinafter § 1331); 28 U.S.C. 1343(a)(3) & (4) and 1343(b)(Supp. 1980), 28 U.S.C. 1343(a)(3) & (4)(1976)(hereinafter § 1343); and L.R. 3-4a(2) & (3)(1980)(hereinafter L.R. 3-4)(Appendices K, L & O, A-17, 18 &19).

At no time, did the petitioner raise, before the Committee on Admissions or local

courts, a claim of a present right to admission to the Bar or claims of Constitutional challenges because, as stated before, Rule 46(b) prohibited raising said claims.

The determination the petitioner sought from the Committee, was not a declaration of rights as they stood on present or past facts under laws already existing, but the petitioner sought an explanation of why her answers were wrong when they were supported by case law, statutes, regulations and/or logic.

Moreover, the petitioner did not ask the district court to review a judicial decision of the Committee or local appeals court, since by virtue of the statutory grant of authority pursuant to § 2501, the Committee and the local appeals court are incapable of rendering judicial decisions.

The petitioner did ask the federal district court to hear and decide, de novo, Constitutional claims raised by the petitioner which could not be raised before the Committee because of its rules, and which claims could not be raised before the local appeals court, since that court, being an appellate court, lacks original jurisdiction.

In conclusion, the petitioner states that all decisions of the Committee on Admissions of the District of Columbia Bar and the local appeals court, made pursuant to § 2501, a rule-making statute, are not judicial decisions, but are decisions relating to rules and rule-making, and which, as this Court stated in Feldman, slip op. at 24, are cognizable in federal district

court.

II

Violation of 42 U.S.C. 1983 (1976 and Supp. 1980)(hereinafter § 1983) is one of the petitioner's claims.

Section 1983, in relevant part states,

> Every person who, under color of any statute, ordinance, regulation custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The statute that specifically confers jurisdiction upon federal district courts to entertain § 1983 actions is § 1343, which states in relevant part,

> That district courts shall have original jurisdiction to redress the deprivation, under color of State or D.C. law, statute, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution or any federal law providing for equal rights.

U.S. CONST.art. III, § 2, § 1331 and §1343 are statutes that confer, upon

federal district courts, jurisdiction to entertain § 1983 actions.

Sections 1331 and 1343 confer, upon federal district courts, original jurisdiction to entertain § 1983 actions.

With original jurisdiction, the federal district court has authority to entertain a case or controversy de novo; that is, to entertain all federal questions, de novo.

Neither art. III, § 2, § 1331 nor § 1343 contains conditions precedent to the exercise of original jurisdiction once it has been established there is a federal question.

This Court in Patsy v. Bd. of Regents of Florida, __ U.S. __, (No. 80-1874, Decided 6-23-82), held that exhaustion of state administrative remedies is not a prerequisite to maintaining a § 1983 action in federal district court.

This decision logically follows from the purpose of the statute: a litigant with a "color of Law claim" is not required to exhaust state administrative remedies, and hence, is not required to litigate, in state courts, a § 1983 action.

Section 1983 when enacted did not contain an exhaustion-of-state-administrative-remedies requirement. And now, it requires exhaustion of state remedies in only one circumstance: when an adult prisoner brings an action pursuant to § 1983.

Section 1983 nor its legislative history contains an exhaustion requirement in connection with bar applicants raising

Constitutional challenges: be those challenges related to a state's rules and regulations governing admission or challenges related to a claim of a present right to admission to the Bar.

As this Court states in Patsy, slip op. at 11,

> A judicially imposed exhaustion requirement would be inconsistent with Congress' decision to adopt § 1997e [the prisoner exhaustion requirement] and would usurp policy judgments that Congress has reserved for itself.

Any requirement, by the judiciary, to impose an exhaustion requirement by requiring a litigant to litigate, in a state court, Constitutional challenges relating to bar admission rules, or challenges relating to a claim of a present right of admission to the Bar, defeats the intent and purpose of § 1983, and is an impermissible usurping of Congressional powers.

Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978), reiterates the fact that federal district courts have subject matter jurisdiction to decide § 1983 actions where officials are sued for actions under color of law.

When applying the no exhaustion requirement of § 1983 in Patsy, to the facts in the petitioner's case, one inevitable must conclude that where there is no requirement the petitioner's Constitutional challenges first be heard by the state, the petitioner can have any Constitutional claim,

including challenges relating to Bar admission rules, as well as, claims of a present right to admission, heard in the first instance, by the federal district court.

Evanna Powell, Pro se
5749 5th Street, N.E.
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AFFIDAVIT OF SERVICE

CITY OF: Washington

STATE OF: District of Columbia

I, Evanna Powell, being first duly sworn, state that three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit were mailed, with prepaid postage, this , day of , 1983, to

Diana M.. Savit, Asst. Corp. Counsel
Attorney for the Defendants
District Building
1350 "E" Street, N.W.
Washington, D.C. 20004

Evanna Powell, Pro se
5749 5th Street, N.E.
Washington, D.C. 20011
529-2773

Subscribed and sworn to before me this
day of , 1983.

Notary Public

APPENDIX A
Judgment: United States Court of Appeals
for the District of Columbia

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2020 September Term, 1982
Civil Action
No. 81-2622

EVANNA POWELL
Appellant

v.

ANTHONY NIGRO et al.

Appeal from the United States District Court for the District of Columbia

Before Wright, MacKinnon, and Bork, Circuit Judges.

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and was briefed by counsel. The issues presented have been fully considered by the court; they occasion no need for an opinion. See D.C. Cir. Rule 13(c).

At the time of its decision in this case the District Court did not have the benefit of the Supreme Court's opinion in District of Columbia Court of Appeals v. Feldman, __ U.S.__, 51 USLW 4285 (March 23, 1983). Under the circumstances, we deem it appropriate to remand this case to the District Court for further consideration in light of that Supreme Court opinion.

On consideration of the foregoing, it is

ORDERED and ADJUDGED by this court that this case is remanded to the District Court.

It is FURTHER ORDERED by this court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 14, as amended November 30, 1981 and June 15, 1982.

Per Curiam
For the Court

/s/George A. Fisher
Clerk

Bills of costs must be files within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

## APPENDIX B

Memorandum Opinion, United States District Court for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL
Plaintiff

Civil Action
No. 81-2622

ANTHONY NIGRO, et al.,
Defendants

### MEMORANDUM

Plaintiff, a Black who was unsuccessful in her attempt to pass the District of Columbia bar examination, brings this action pro se against several past and present members of the Committee on Admissions to

the Bar of the District of Columbia Court of Appeals. Plaintiff essentially alleges that defendants' construction and grading of the bar examination violated her rights under the equal protection and due process of law components of the Fifth Amendment. Plaintiff premises jurisdiction on section 1331 of title 28, 28 U.S.C. § 1331 (Supp. IV. 1980), and section 1343 of title 28, 28 U.S.C.§ 1343 (1976). The action is before the Court on the defendants' motion to dismiss for lack of subject matter jurisdiction.

I

The Committee on Admissions performs a judicial function on behalf of the District of Columbia Court of Appeals by administering the District of Columbia bar examination and judging the fitness of applicants to practice law. See Richardson v. McFadden, 563 F.2d 1130,1132 (4th Cir. 1977)(Hall, J. concurring in the result), cert denied, 435 U.S. 968 (1978); Feldman v. State Board of Law Examiners, 438 F.2d 699, 704 (8th Cir. 1971); Keenan v. Board of Law Examiners, 317 F. Supp. 1350, 1344 n.5 (E.D.N.C. 1970). The Committee on Admissions, however, "does not itself admit applicants to the bar, nor disbar attorneys, but merely makes recommendations to the court may or may not elect to follow." Feldman v. State Board of Law Examiners, 438 F.2d at 702. Accord, Kennedy v. Educational Testing Service, Inc., 393 A.2d 523, 525 (D.C. 1978). The Court of Appeals alone may make the final decision, whether to admit a particular applicant to the District of Columbia bar. D.C. Code § 11-2501 (1981); Kennedy v. Educational Testing Service, Inc., 393 A.2d at 525. See Richardson v. McFadden, 563 F.2d at 1132-33(Hall, J., concurring in the result);

Feldman v. State Board of Law Examiners, 438 F.2d at 702; Chaney v. State Bar of California, 386 F.2d 962, 966 (9th Cir. 1967), cert. denied, 390 U.S. 1011 (1968).

For applicants who do not pass the bar examination, the Committee on Admissions provides its Post Examination Review Procedure. Under the review procedure,

> [e]ach unsuccessful applicant is notified of his score on each essay question, his "raw score" for each section of the [Multi-state Bar Examination], and his combined score. Upon request the applicant may meet with the Secretary to the Committee for a review of his essay paper and the questions as framed by the examiners and the examiners' comments with respect to each question. An unsuccessful applicant may submit within a fixed time, without identifying himself, a petition for regrading to each examiner he wishes with supporting reasons. The Secretary must submit to each examiner so petitioned, the petition, the petitioner's examination book and the examiner's questions and comments with respect to such questions. The unsuccessful applicant is notified by the Secretary of the examiner's ultimate disposition of his petition for regrading and the applicant may obtain, upon request, finally a review of the regrading petition and the examiner's disposition thereof by two other members of the Committee.

Harper v. District of Columbia Committee on Admissions, 375 A.2d 25, 26-27 (D.C. 1977)

(emphasis in the original).

Although the District of Columbia has no statutorily established procedure for petitioning the Court of Appeals for review of a final determination of the Committee on Admissions denying certification that an applicant has passed the bar examination, the Court of Appeals nevertheless does accept and consider petitions for review. Kennedy v. Educational Testing Service, Inc., 393 A.2d at 525 (citing as an example Harper v. District of Columbia Committee on Admissions, 375 A.2d 25 (D.C. 1977). See Richardson v. McFadden, 563 F.2d at 1132 (Hall, J., concurring in the result); Feldman v. State Board of Law Examiners, 438 F.2d at 704; MacKay v. Nesbett, 412 F.2d 846, 846-47 (9th Cir.), cert. denied, 396 U.S. 960 (1969); Gately v. Sutton, 310 F.2d 107, 108 (10th Cir. 1962).

II

In this case, plaintiff does not allege that she petitioned the Court of Appeals for review of the Committee on Admission's determination denying certification that she passed the bar examination. Indeed, plaintiff does not even allege that she requested reconsideration by the Committee on Admissions under its Post Examination Procedure. Under these circumstances, this action must be dismissed as premature.[1]

[1] In response to the Court's question at oral argument, plaintiff stated that she last took the District of Columbia bar examination in July of 1980, approximately fifteen months prior to the date on which she filed this action. Plaintiff also stated that she made no efforts, legal or

This result has been explained by the United States Court of Appeals for the Ninth Circuit in a case involving facts similar to those in this case:

> The significance of this is that under California law a refusal of certification is not a power of deprivation. Only if the Court expressly or impliedly approves the Committee's refusal to certify so as to make this the basis or allow it to have the effect of a denial of admission can the Committee's actions of examination and refusal to certify come to be a status and have the stature of a deprivation.
> Thus the situation here is not a matter of exhausting state remedies in respect to an alleged federal right but of there being no basis for any alleged federal right to exist as to the Committee's actions until the California Supreme Court in the exercise of its original power over admissions has allowed these actions to serve as a deprivation. The holding Monroe v. Pape, 365 U.S. 167, 183 ... [(1961)], and McNeese v. Board of Education, 373 U.S. 668, 671-72 ... [(1963)], that it is not necessary to exhaust state remedies before a

---

otherwise, to require the Committee on Admissions to preserve her examination papers from that or any previous bar examination that she took. Accordingly, this action may be moot because Rule 46I.(b)(10) of the District of Columbia Court of Appeals Rules provides that " n inty days after publication of the bar examination results the examination papers shall be destroyed."

> suit can be instituted under the Civil Rights Act, is therefore without application. Whatever may by the scope of the right to sue granted by 42 U.S.C § 1983, it extends in any event only to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States]."

Chaney v. State Bar of California, 386 F.2d 962, 966 (9th Cir. 1967), cert. denied, 390 U.S. 1011 (1968). The Ninth Circuit further explained that

> even if the form of examinations given by the Committee, or their scope and difficulty in allegedly exceeding the educational qualifications prescribed for taking them, or the Committee's grading of them, had been actions which abstractly could be violative of due process or equal protection, this could not give rise to any right of federal remediability until it had been made the basis of a deprivation of admission.

Id. at 966-67.

III

Even if plaintiff had petitioned the Court of Appeals for review, she could only bring in the federal courts certain types of claims arising out of her unsuccessful attempt to gain admission to the District of Columbia bar. As the United States Court of Appeals for the Tenthe Circuit ex-

plained in Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976), cert. denied, 431 U.S. 916 (1977), there is a fundamental distinction between two types of claims potentially brought by an unsuccessful applicant in the federal courts.

> The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission.

Id. at 597. The first type of claim involves review of the legislative or rulemaking authority of the state's highest court and thus may fall within the jurisdiction of the federal courts. Id. See Richardson v. McFadden, 563 F.2d at 1133 (Hall, J., concurring in the result); Keenan v. Board of Law Examiners, 317 F.Supp. at 1355 n.5. The second type of claim involves review of an exercise of judicial power by the state's highest court and thus falls outside the jurisdiction of the federal courts because only subject to review by petitioning the Supreme Court of the United States for a writ of certiorari. Doe v. Pringle, 550 F.2d at 597. See Richardson v. McFadden, 563 F.2d at 1133 (Hall, J., concurring in the result); Feldman v. State Board of Law Examiners, 438 F.2d at 704; Keenan v. Board of Law Examiners, 317 F.Supp. at 1355 n.5. See also In Re Summers, 325 U.S. 561, 565-66(1945).

In this case, plaintiff presents both types of claims. Plaintiff first challenges the legislative or rulemaking authority of the Court of Appeals by arguing that the

District of Columbia bar examination, as constructed, discriminates against Blacks. Plaintiff then challenges the Court of Appeals' exercise of judicial power by arguing, on several bases, that the Committee on Admissions graded her bar examination in a racially discriminatory manner.

Although plaintiff's challenge to the construction of the District of Columbia bar examination normally represents the type of claim that is cognizable in the federal courts, in this case plaintiff's claim must be dismissed for failure to present a substantial federal question. See Feldman v. State Board of Law Examiners, 438 F.2d at 704; Cheney v. State Bar of California, 386 F.2d at 967-68. In 1977, the Court of Appeals reviewed an identical challenge to the bar examination and decided, after according the matter full and careful consideration, that the bar examination was not constructed in a racially discriminatory manner. Harper v District of Columbia Committee on Admissions, 375 A.2d at 27-30. Plaintiff does not allege that the construction of the bar examination has changed materially since that time.

Plaintiff's various challenges to the grading of her bar examination involve review of an exercise of judicial power by the Court of Appeals and thus must be dismissed for lack of subject matter jurisdiction. This conclusion is not affected by the fact that plaintiff's claim is based on alleged deprivations of federally protected due process of law and equal protection rights. See Richardson v. McFadden, 563 F.2d at 1132-33 (Hall, J., concurring in the result); Doe v. Pringle, 550 F.2d at 599; Woodard v. Virginia Board of Bar

Examiners, 454 F.Supp. 4, 6 (E.D. Va. 1978), aff'd 598 F.2d 1345 (4th Cir. 1979).

Accordingly, defendants' motion to dismiss is granted in its entirety.

An Order consistent with this Memorandum follows.

/s/John Lewis Smith,Jr.
United States District Judge

Dated: July 28, 1982

APPENDIX C
Order: United States District Court for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL
Plaintiff,

Civil Action
No. 81-2622

ANTHONY NIGRO, et al.,
Defendants

ORDER

Upon consideration of defendants' motion to dismiss, plaintiff's opposition thereto oral argument of counsel and the entire record, it is by the Court this 28th day of July 1982

ORDERED that defendant's motion to dismiss is granted, and it is further

ORDERED that this case is dismissed.

/s/John Lewis Smith,Jr.
United States District
Judge

APPENDIX D
Memorandum Opinion: United States District Court for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL,
Plaintiff

Civil Action
No. 81-2622

ANTHONY NIGRO, et al.,
Defendants

MEMORANDUM

Evanna Powell, a Black who was unsuccessful in her attempt to pass the District of Columbia bar examination, brings this action pro se against several past and present members of the Committee on Admissions to the Bar of the District of Columbia Court of Appeals. Plaintiff alleges that the defendants' construction and grading of the District of Columbia bar examination deprived her and other Black examinees of their rights under the equal protection and due process of law components of the Fifth Amendment. Plaintiff at this time moves the Court to certify this action as a class action, presumably under Rules 23 (b)(2) of the Federal Rules of Civil Procedure, on behalf of herself and "all past, present and future Blacks who have taken or will take the District of Columbia bar examination."

One of the requirements for certification of an action as a class action is that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). As a general rule,

> [a]dequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.

Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 247 (3rd Cir.), cert. denied, 421 U.S. 1011 (1975). Accord, Martin v. Mittendorf, 420 F.Supp. 779, 780(D.D.C. 1976).

In this case, plaintiff is not "qualified, experienced, and generally able to conduct the proposed litigation." In making this determination, the Court "recognizes, of course, that each pro se plaintiff presents a different case and possesses a different level of proficiency." Martin v. Mittendorf, 420 F.Supp. at 780-81. Admittedly, plaintiff has graduated from a law school accredited by the American Bar Association. She has not, however, passed the District of Columbia bar examination or, apparently, the bar examination of any State. In addition, plaintiff possess no in the type of litigation represented by this action. Cf. Aznavorian v. Califano, 440 F.Supp. 788, 793 (S.D. Cal. 1977), rev'd on other grounds, 439 U.S. 170 (1978); Coburn v. 4-R Corp., 77F.R.D. 43, 45(E.D. Ky. 1977). Finally, as demonstrated by the quality of the memoranda that she has submitted during the early stages of this litigation, such as her opposition to

defendants' pending motion to dismiss, plaintiff does not now possess the legal skills necessary to adequately protect the interests of the proposed class. See Pelelas v. Caterpillar Tractor Co., 113 F.2d 629, 632 (7th Cir.), cert. denied, 311 U.S. 700 (1940); Johnson v. Shreveport Garment Co., 422 F.Supp. 526, 534-41 (W.D. La. 1975).

Accordingly, plaintiff's motion for certification of this action as a class action is denied.

An Order consistent with this Memorandum follows.

/s/John Lewis Smith, Jr.
United States District
Judge

Dated: April 2, 1982

APPENDIX E
Order: United States District Court
for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL
Plaintiff,

v.

Civil Action
No. 81-2622

ANTHONY NIGRO, et al.,
Defendants

ORDER

Upon consideration of plaintiff's motion for class certification, defendants'

opposition, oral argument of counsel and the entire record, it is by the Court this 2nd day of April 1982

ORDERED that plaintiff's motion for class certification is denied.

/s/John Lewis Smith, Jr.
United States District Judge

APPENDIX F
Order: United States District Court for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EVANNA POWELL
Plaintiff,

v.

Civil Action No. 79-3208

ANTHONY NIGRO,
Defendant

ORDER

Upon consideration of defendant's motion to dismiss the complaint, memorandum of points and authorities in support thereof, and it appearing that the complaint fails to state a claim upon which relief may be granted, it is, this 4th day of January, 1980,

ORDERED: That defendant's motion be, and the same is, hereby granted; and it is

FURTHER ORDERED: That the complaint be, and the same is, hereby dismissed, with

prejudice.

/s/Aubrey E. Robinson, Jr.
Judge

APPENDIX G

Order: United States Court of Appeals for the District of Columbia

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1147

September Term, 1979
Civil Action
No. 79-3208

EVANNA POWELL
Appellant

v.

Filed: April 2, 1980

Anthony Nigro, in his official capacity as Secretary to The Committee on Admissions of the District of Columbia Bar

BEFORE: Wright, Chief Judge, Tamm and Edwards, Circuit Judges

ORDER

On consideration of appellant's motion for summary reversal, appellee's motion for summary affirmance, the oppositions thereto and of appellant's reply, it is

ORDERED by the Court that the motion for summary reversal is denied, and, it is

FURTHER ORDERED by the Court that appellee's motion is granted and the order of the District Court on appeal herein is

summarily affirmed.

Per Curiam

(Appellant's copy was not signed bu the copy had an original date stamp affixed)

Chief Judge Wright did not participate in the foregoing order.

APPENDIX H

Order: United States Supreme Court

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

October 6, 1980

Evanna Powell
5749 5th Street, NE
Washington, DC 20011

RE: Evanna Powell
v. Anthony Nigro
No. 79-2057

Dear Ms. Powell:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

/s/Michael Rodak, Jr., Clerk

APPENDIX I
U.S.CONST.art. III, § 2

The judicial Power of the United States shall extend to all cases arising under this Constitution, and the Laws of the United States ****(emphasis added).

APPENDIX J
U.S.CONST.amend. V

No person shall be *** deprived of life, liberty, or property, without due process of law.

Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX K
28 U.S.C. 1331 (Supp. 1980)

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. (emphasis added).

APPENDIX K
28 U.S.C. 1331(a)(1976)

The district courts shall have original jurisdiction of all civil actions *** arisling under the Constitution, laws, or treaties of the United States **** (emphasis added).

APPENDIX L
28 U.S.C. 1343(a)(3) &(4); 1343(b)(Supp. 1980)

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person ***

(3) To redress the deprivation, under color of any State law, statute, ordinance, or regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights ****

(b) For purposes of this section--
(1) the District of Columbia shall be considered to be a State ****

APPENDIX L
28 U.S.C. 1343(a)(3) & (4)(1976)

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person ***

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights ****

APPENDIX M
42 U.S.C. 1983 (Supp. 1980)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected,

any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (emphasis added).

APPENDIX M
42 U.S.C. 1983 (1976)

Every person who, under color of any statute, ordiance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX N
D.C. Code 11-2501(1973)(1981)

The District of Columbia Court of Appeals shall make such rules as it deems proper regarding the examination, qualification, and admission of persons to membership in its bar ****

APPENDIX O
L.R. 3-4 a(2) & (3)(1980)

Civil cases are deemed related when they (1) relate to common property, or (2) involve common issues of fact, or (3) grow out of the same event or transaction.

Additionally, cases whether criminal or civil shall be deemed related where a case is dismissed, with or without pre-

judice, and a second case is filed involving the same parties and relating to the same subject matter.

APPENDIX P
Rule 46(b)(10)(iii) & (vi)

(iii) The petition for regrading shall be directed to the merits of the applicant's response to the examination questions.

(vi) The petition for further review shall state the reasons for the exception taken to the applicant's grade.